

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

GREG SELLARDS)	Civil Action No. 3:05-CV-1182-B
)	
Plaintiff,)	ECF
)	
vs.)	
)	
)	
SUN MEDICAL, INC., THE SUN MEDICAL, INC. EMPLOYEE STOCK OWNERSHIP PLAN, and THE SUN EXECUTIVE RETIREMENT PLAN)	
)	
)	
Defendants)	<u>DEFENDANTS' MOTION FOR LEAVE TO FILE AMENDED PLEADING AND SUPPORTING BRIEF</u>

Pursuant to Fed. R. Civ. P. 16(b)(1), the Scheduling Order herein, and L. R. 7.1, Defendants' request leave of Court to file Defendants' Amended Answer and Counterclaims.

A.

Introduction

1. Plaintiff is Greg Sellards; Defendants are Sun Medical, Inc., The Sun Medical, Inc. Employee Stock Ownership Plan, and The Executive Retirement Plan.
2. Plaintiff sued Defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, at Sec. et. seq. as amended.
3. Defendants filed an Original Answer and Counterclaims on August 25, 2005. Defendants' Counterclaims against Sellards include causes of action for quantum meruit, and breaches of fiduciary duty under state and federal law.

B.

Argument

4. Unless the opposing party can show prejudice, bad faith, or undue delay, a court should grant leave to file an amended pleading. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). Leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15(a); *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002).

5. The Court should allow the pleading of Defendants' amended pleading because of newly discovered evidence resulting from the deposition of the Plaintiff taken by Defendants on January 27, 2006. Defendants will be prejudiced if they are not allowed to amend.

6. Plaintiff will not be prejudiced by the Defendants' amended pleading because Plaintiff has adequate time before the expiration of deadlines for Plaintiff's expert designation, dispositive motions, and completion of discovery.

7. Defendants have attached their amended pleading along with this motion.

C.

Conclusion

For these reasons, Defendants respectfully ask the Court to grant leave to file the Defendants' Amended Answer and Counterclaims.

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS

Attachment

Defendants' Amended Answer and Counterclaims

CERTIFICATE OF CONFERENCE

I certify that on January 30, 2006, I attempted to confer with Robert L. Wright, attorney for Greg Sellards, but Mr. Wright was involved in a deposition. Mr. Wright left a message on my answering machine on the morning of January 31, 2006, indicated he was in deposition, and asked that I send him a copy of my amended pleading. I faxed him a copy of my amended pleading shortly after noon, January 31, 2006. I called Mr. Wright's office at 2:20 p.m., January 31, 2006, and Mr. Wright's secretary indicated that he was still in deposition. Accordingly, I cannot represent to the Court whether Mr. Wright opposes or does not oppose this motion.

James D. Runzheimer

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on Greg Sellards, by and through his attorney Robert L. Wright, 612 Eighth Avenue, Fort Worth, Texas 76104, in accordance with the Federal Rules of Civil Procedure on January 31, 2006 by facsimile.

James D. Runzheimer
Attorney for Defendants